No. 15086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of RIVERSIDE IRON & STEEL CORPORATION,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLEE'S BRIEF.

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Statement of Jurisdiction.

This is an appeal by the appellant as trustee in bankruptcy of the estates of Riverside Iron and Steel Corporation and Harlan H. Bradt, consolidated bankrupt estates. Judgment was rendered against the appellant by the United States District Court of the Southern District of California, Central Division.

The claim of the appellant alleged that the appellee had received a preference under Section 60 of the Bankruptcy Act (11 U. S. C. A. 96) in that, within a period of four months prior to the filing of a voluntary petition in bankruptcy by the Riverside Iron and Steel Corporation in the United States District Court for the Southern District of New York, appellee had pursuant to writ of execution received payment of an antecedent debt which, if permitted to stand, would permit appellee to obtain a greater

percentage of his debt than any other creditor in his class. The complaint further alleged that at the time of the obtaining of the lien and payment, Riverside was insolvent and that appellee had knowledge or reasonable cause to believe that Riverside was insolvent.

Statement of the Case.

The case was tried upon a stipulation of facts and amendment to the stipulation of facts, the issues of whether or not Riverside was insolvent at the time of the obtaining of the lien and the subsequent payment and the question of whether or not the appellee had knowledge or reasonable cause to believe Riverside was insolvent was reserved for further hearing in the event that it was held that both the lien and the payment were obtained within four months prior to the voluntary petition in bankruptcy filed by Riverside.

The stipulation of fact has been incorporated in its entirety in the findings of fact. [Tr. p. 37.]

On December 5, 1946, Thomas A. Wood filed an action against Riverside Iron and Steel Corporation for attorney's fees in the sum of $4,012.90 together with interest thereon at the rate of 7% per annum from the 27th day of June, 1944. [Tr. p. 38.]

That in said action and on December 5, 1946, a writ of attachment issued out of the Superior Court of the State of California, in and for the County of Los Angeles, directed to E. T. Foley. Said writ of attachment was by the Sheriff of Los Angeles County on December 5, 1946, served upon the said E. T. Foley. [Tr. p. 38.]

That on the 16th day of December, 1946, E. T. Foley made return stating that he was unable to state whether

or to what extent he had in his possession or under his control any credits or other personal property belonging to the Riverside Iron and Steel Corporation, or whether or to what extent he was indebted to said Riverside Iron and Steel Corporation. [Tr. p. 38.]

That on August 4, 1948, E. T. Foley made a supplemental answer to the writ of attachment theretofore served upon him by the Sheriff of Los Angeles County in which he recited, among other things, the deposit with the Clerk of the Superior Court of the State of California, pursuant to order of court, of the sum of $329,263.46, of which $82,619.63 was for the use and benefit of Riverside Iron and Steel Corporation and Harlan H. Bradt. [Tr. pp. 49-50.]

Prior to the deposit of said funds with the Clerk of the Superior Court of the State of California, a stipulation was entered into by E. T. Foley, Riverside Iron and Steel Corporation and Harlan H. Bradt, by and through their respective counsel, reciting among other things that an attachment had been served upon Foley in the action Wood v. Riverside Iron and Steel Corporation.

This stipulation was subsequently joined by all other counsel involved in the case of Foley v. Riverside Iron and Steel Corporation. The stipulation appears in Transcript, page 51.

The judgment in Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt, after providing for the deposit of the money with the Clerk of the Superior Court of the State of California, provided that:

> "The court recognizes the possibility that one or more writs of attachment and one or more writs of execution may be served upon the Clerk which ulti-

mately and lawfully may require him to pay over to an enforcement officer part or all of the funds hereinabove ordered to be paid severally to one or more named distributees. It is not this court's intention to enjoin the Clerk from the performance of any such duty, and should he in the performance of such a duty pay over to an enforcement officer any portion of the fund otherwise payable hereunder to a certain distributee, any and all sums so paid over shall be deemed, for the purpose of distribution herein ordered, to have been paid by the Clerk to said distributee and shall be charged against and deducted from the full sum otherwise payable hereunder to said distributee." [Tr. pp. 41-42.]

The judgment further provides:

"That upon the date when this judgment shall have become final in the court in which this proceeding shall be finally decided, the Clerk of the Superior Court shall forthwith and without further order of this court distribute and pay said sum of $329,263.46 to the parties to this action now to be named and in the several amounts as follows: * * * To Riverside Iron and Steel Corporation and Harlan H. Bradt the sum of $82,619.69 * * *." [Tr. p. 41.]

Judgment was entered in favor of Wood and against the Riverside Iron and Steel Corporation on April 8, 1949. On June 28, 1949, a writ of execution was issued out of the Superior Court of the State of California, and by the Sheriff served upon the County Clerk. [Tr. p. 42.]

To the writs of execution issued in the action of Wood v. Riverside Iron and Steel Corporation, the County Clerk made return that he was holding certain moneys pending the final judgment in the action.

On December 1, 1950, there was issued out of the Superior Court of the State of California, in and for the County of Los Angeles, an order to show cause in action No. 520858, styled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, Harlan H. Bradt, *et al.,* defendants, in which it was ordered that Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, and *LeRoy B. Lorenz, assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt in the above entitled cause* (emphasis added), show cause why an order should not be made in the above entitled action directing Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, to pay to the Sheriff of the County of Los Angeles, in satisfaction of the judgment entered in Wood vs. Riverside Iron and Steel Corporation, out of funds on deposit with the County Clerk in the above entitled action the sum of $4,012.98 with interest at the rate of 7% per annum from the 27th day of June, 1944, plus $18.00 costs, in satisfaction of the judgment of Wood vs. Riverside Iron and Steel Corporation. [Tr. pp. 55-56.]

That order to show cause came on for hearing on the 8th day of December, 1950, and the Superior Court made the following findings and order:

> "The above entitled matter coming on for hearing on the 8th day of December, 1950, pursuant to order to show cause issued on the 1st day of December, 1950, Thomas A. Wood appearing for the moving party and Harold W. Kennedy, County Counsel, by John B. Anson, Deputy County Counsel, appearing for Harold J. Ostly, County Clerk and Clerk of the

Superior Court of the State of California, in and for the County of Los Angeles, *Leroy B. Lorenz, assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt having been served with said order to show cause on the 1st day of December, 1950 and having defaulted and the default of the said Leroy B. Lorenz having been entered* [emphasis added], the matter having been submitted to the court for decision on the affidavits and oral argument,

Now Therefore, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, is hereby ordered to pay over to Eugene W. Biscailuz, Sheriff of the County of Los Angeles, State of California, the sum of $4,012.98 with interest at the rate of 7% per annum from the 27th day of June, 1944, plus $18.00 costs, in response to the writ of execution issued in that certain action styled Thomas A. Wood vs. Riverside Iron and Steel Corporation, a corporation, numbered 522523 and heretofore served upon said Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by said Sheriff, and to pay said money out of funds heretofore deposited in the above entitled action by the plaintiff E. T. Foley pursuant to order of court, for the use and benefit of Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt." [Tr. pp. 44-45.]

That pursuant to said order, the Clerk of the Superior Court of the State of California paid out of the funds then in his possession to the Sheriff of the County of Los Angeles the sum of $5,838.49. [Tr. p. 45.]

Following the entry of judgment in the Superior Court of the State of California, in and for the County of Los Angeles, in the case of E. T. Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt, the Riverside Iron and Steel Corporation and Harlan H. Bradt took an appeal to the District Court of Appeal, Second Appellate District, State of California; that said judgment was affirmed by the District Court of Appeal of the State of California; that a petition for hearing in the Supreme Court was denied and a remittitur filed in the Superior Court of Los Angeles County on the 20th day of November, 1950. [Tr. p. 48.]

The Writ of Attachment Served on December 5, 1946, Remained Effective Until Long After the Judgment in Foley v. Riverside Iron and Steel Corporation Became Final.

The first writ of attachment giving rise to a lien in favor of Wood was served on E. T. Foley on December 5, 1946. The validity of this garnishment is not challenged in this action. Foley, on August 1, 1948, pursuant to order of court, deposited with the Clerk of the Superior Court of the State of California the moneys involved in the garnishment. At that time 19 months of the 3-year period provided for by Section 542(b) of the California Code of Civil Procedure had expired. The money was deposited with the Clerk to be paid out by him "when this judgment shall have become final in the court in which this proceeding shall finally be decided." This was on the 30th day of November, 1950.

Appellant's argument is that in Foley v. Riverside Iron and Steel Corporation, the money deposited with the Clerk was by such judgment placed *in custodia legis;*

that thereafter and while *in custodia legis* it was not subject to attachment or to execution, that the period provided by Section 542(b) of the California Code of Civil Procedure continued to run, to the end of the three years, counting the period prior to the deposit *in custodia legis,* counting the time that the money was *in custodia legis,* that at the end of 3 years from December 5, 1946, the lien ceased to exist; that Riverside Iron and Steel Corporation, by taking an appeal thus preventing Wood from collecting his judgment, obtained an advantage which its trustee in bankruptcy can now urge in his attempt to collect from Wood. Contending the lien on the fund was created by the writ of execution issued on the 21st day of December, 1950.

The reason that the Clerk could not pay the money out prior to final judgment was that he was enjoined from so doing by the judgment in Foley v. Riverside. Section 356 of the Code of Civil Procedure provides:

> "When the commencement of an action is stayed by an injunction or statutory prohibition, then the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

By analogy here the County Clerk was enjoined from paying out moneys on deposit with him pursuant to a writ of execution until such time as the judgment became final. The time in which the lien of the attachment would expire was stayed pending the final determination in Foley v. Riverside Iron and Steel Corporation.

Appellant Argues That the Attachment or Garnishment Created No Lien on the Fund or Credit in the Hands of Foley Other Than the Right of the Attaching Creditor to Collect His Judgment From Foley in the Event That Foley Failed to Retain in His Possession the Fund or the Credit.

Appellant ignores the fact that Foley paid the fund into court pursuant to order of court, ignores the fact that the lien created by an attachment or garnishment upon credits has nothing to do with the possession of the property. The lien is created when the writ is served upon the person holding the credits and the credits in the possession of the holder are subject to the lien.

> *Bank of America v. Riggs,* 39 Cal. App. 2d 679 at 683, 104 P. 2d 125.

Further it is the law in California that with the service of the attachment or garnishment a lien is obtained on defendant's title to the property in the hands of the garnishee. This was held in *Kimball v. Richardson Kimball Company,* 111 Cal. 386 at 389, 43 Pac. 1111, where the court says:

> "It is further contended that if a lien by direct attachment were sufficient to give the intervener a standing in court, he claimed no such lien but only to have a garnishment which creates no lien on the property.
>
> "Garnishment under our law is but another name for the service of a writ of attachment upon personal property in the possession of persons other than the defendant in the writ and also to secure debts, credits, etc. in the hands of such third persons.
>
> "By the service in the manner provided by statute, whether it be termed garnishment or service of the

> attachment, while the possession is not necessarily disturbed, 'a lien is obtained on defendant's title to the property in the hands of the garnishee.' (*Wade on Attachments,* Section 338.)"

This is the rule adopted by the weight of opinion in the United States. This is pointed out in 5 American Jurisprudence, page 88, paragraph 817:

> "With respect to the binding effect of garnishment on the property garnished, the weight of opinion is that such process operates as an attachment and fastens upon the property or debt a lien by which it is brought under the jurisdiction of the court. According to this view, then, a garnishment has the same effect as an attachment in bringing the property or debt garnished into *custodia legis* although the garnished property is left in the hands of the garnishee or receiptor whose office with respect to the garnished property is said to be that of a bailee of the attaching or garnishing officer which, in many jurisdictions, he is expressly called. * * *"

The appellant states that the Clerk did not take the money deposited by Foley subject to the lien of attachment, the authorities above cited are to the effect that the lien attached to the property. Deposit was made with the Clerk pursuant to order of court. The appellee was not before the court in Foley v. Riverside Iron and Steel Corporation and his rights could not be destroyed by such an order. The appellant states, "The attaching creditor obtains only a potential right or contingent lien and cites *Puissegur v. Yarborough,* 29 Cal. 2d 409 (175 P. 2d 830), the court makes that statement at page 412 and cites in support of it 5 American Jurisprudence 94; 3 California Jurisprudence 477. 5 American Jurispru-

dence, page 94, under the paragraph dealing with contingent and inchoate character of lien says:

> "An attachment or garnishment lien is said to be contingent or inchoate at least until final judgment against the defendant and the garnishee."

In other words, all that the court was saying in the above cited case was that the attachment lien could be destroyed by failure of the attaching creditor to secure a judgment.

In 3 Cal. Jur. 477, the court says:

> "The right secured by an attachment being merely contingent and depending upon the recovery of judgment by the plaintiff, it necessarily follows that a final judgment for the defendant *ipso facto* works a dissolution of the attachment."

The case of *Finch v. Finch,* 12 Cal. App. 274, 107 Pac. 594, is not in point. In the *Finch* case a garnishee did not retain the money in its possession. It paid it to the sheriff on a subsequent execution. In the case at bar, Foley made his return to the writ of attachment served on December 5, 1946, that he did not know how much, if anything, he had in his possession belonging to the Riverside Iron and Steel Corporation and that that matter would be determined in an action that was then pending styled Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt. It was determined in Foley v. Riverside Iron and Steel Corporation that Riverside Iron and Steel Corporation and Bradt were entitled to the sum of $82,619.69 when the judgment became final. As a part of this determination the court required Foley to deposit this money with the Clerk of the Superior Court. Foley did not voluntarily dispose of it to the Sheriff in another attachment as did the bank in *Finch v. Finch* and

put it beyond the reach of the plaintiff in the attachment action. In the case at bar the money was preserved intact and transferred by order of court, which Foley had to obey, from Foley to the Clerk.

The Period of Time Between the Deposit of the Money in Court and the Final Judgment in Foley v. Riverside Iron and Steel Corporation Is Not Counted in Determining the Three Years in Which the Lien of the Attachment Remains Pursuant to Section 542(b) of the Code of Civil Procedure.

In the *Estate of Troy,* 1 Cal. App. 2d 732, 37 P. 2d 471, a writ of attachment was issued on certain personal property in the estate, which property was to be received by Beatrice H. Hanks as a residuary legatee. The attachment was levied in August of 1927. In March of 1928, Beatrice H. Hanks was adjudicated a bankrupt. In April, 1928, the Credit Clearance Bureau obtained a judgment against Beatrice H. Hanks upon which execution has been issued. The point was made in the case that the 3-year period provided for under Section 542(b) of the Code of Civil Procedure, had expired and that the attachment had lapsed, the same point being made in the case at bar. The court, on page 734 says:

> "In approaching the questions presented on this appeal, it should be borne in mind that though the decedent died in April, 1925 and the decree of distribution was not made until January, 1934, the the parties concede that the delay was due to litigation involving the estate and was not in any way due to any lack of diligence on the part of respondents herein."

The court then discusses another attachment and after holding that there was no property left in the estate to which the other attachment could attach, says:

> "The portion of the decree relating to the lien of the Credit Clearance Bureau is not affected by the aforegoing. The attachment was levied after the realty had been converted into cash and the claim was reduced to judgment before distribution and before Beatrice H. Hanks was adjudged a bankrupt. The only question raised by appellant relative to this portion of the decree is whether the lien of the attachment lapsed on the expiration of the period of three years from the date of the levy under the provisions of Section 542(b) of the Code."

The court then discusses Section 561 of the Code of Civil Procedure, a special statute dealing exclusively with the attachment of the interest of an heir or legatee in personal property of an estate, and on page 736 continues:

> "Section 542(b), which limits the life of an attachment lien to three years from the date of the levy, is a general provision enacted for the purpose of compelling diligence on the part of the attaching creditor. (*Jones v. Toland,* 117 Cal. App. 481, 483 [4 Pac. (2d) 178].) This reason does not apply where an attachment is levied upon the interest of an heir or legatee because the attaching creditor has no power to control the proceedings in probate. When the reason for the rule ceases, the rule ceases, and when the rule can be applied only by implication, it should not be applied when there is no reason for it. There are many authorities holding that where a right existed in common law, a statutory remedy is merely cumulative, but that, where the right is given and the remedy is provided by statute, the statutory

> remedy must be pursued. (*People v. Craycroft*, 2 Cal. 243, 244 [56 Am. Dec. 331]; *Estate of Ward*, 127 Cal. App. 347, 354 [15 Pac. (2d) 901].) This respondent has strictly followed the remedy provided in the statute and we can see no reason why it should be denied the right because those over whom it had no control delayed the proceedings.

In *The Morris Plan Company v. The State of California*, 73 Cal. 2d 415, 166 P. 2d 627, The Morris Plan Company brought an action against the State of California alleging the payment of taxes under protest. A demurrer was sustained without leave to amend upon the ground that the State of California had not given its consent to be sued. The court, on page 422 of its opinion, points out that the law does not permit a legal right to exist without a remedy and, quoting from *Monongahela Bridge Company v. The United States*, 216 U. S. 177, 195, 30 S. Ct. 356, 54 L. Ed. 435, says:

> "Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy consistent with the law for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

In the same case the court quotes from the Supreme Court of California at page 422:

> "In any event this court is not powerless to formulate rules of procedure where justice demands it. Indeed it has shown itself ready to adapt rules of procedure to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits."

In the case at bar, if the courts were powerless to prevent the 3-year period provided for in Section 542(b) of the Code of Civil Procedure from running during the period of time that the Riverside Iron and Steel Corporation took in connection with its appeal from the judgment in *Foley v. Riverside Iron and Steel Corporation,* it would be a simple matter, in many actions, to defeat the attachment simply by securing an order of court and depositing the fund with the Clerk *in custodia legis.*

The question of whether or not the period of time runs under a statute has been passed upon in varying circumstances in the State of California. The leading case is *Christian v. The Superior Court,* 9 Cal. 2d 526, 71 P. 2d 205. In this case a period of 5 years expired from the filing of the complaint and before the action was brought to trial. The governing statute, Section 583 of the Code of Civil Procedure, is mandatory in requiring dismissal of an action not brought to trial within 5 years from the filing thereof unless the parties have stipulated in writing to an extension. In the Christian case, a motion for a change of venue had been made and granted and an appeal was taken. After a reversal by the court holding that the order granting the change of venue was a void order, the defendant sought a dismissal of the action upon the ground that it had not been brought to trial within 5 years. The court denied the motion on the ground that the statute did not run during the time that it was impossible to try the action.

This case has been followed in California by many other cases involving not only Section 583, Code of Civil Procedure, but other statutes. In *Dillon v. Board of Pension Commissioners,* 18 Cal. 2d 427, 116 P. 2d 37,

the time for the filing of the action was suspended where the Board of Pension Commissioners had delayed in passing upon the claim.

In *Wells v. The California Tomato Juice Company,* 47 Cal. App. 2d 634, 118 P. 2d 916, the time to file for the foreclosure of a mechanic's lien was extended beyond the 90-day period where a petition in bankruptcy was pending and where the adjudication had not been made, the plaintiff not being permitted to file until the proceedings in the bankruptcy court had been pursued to a place where authority could be given.

In the *Estate of Morrison,* 125 Cal. App. 504, 14 P. 2d 102, a will contest had been dismissed as a result of fraudulent representation. Thereafter the dismissal was set aside and the contest reinstated. The court held that the period between the dismissal and the reinstatement could not be counted in determining whether or not the 5 years had run under Section 583 of the Code of Civil Procedure.

In *Byrnes v. The Massachusetts Bonding and Insurance Company,* 62 Cal. App. 2d 962, 146 P. 2d 24, the court had before it the limitation prescribed by Section 1487 of the Probate Code which provides:

> "No action may be maintained against the sureties on a bond given by a guardian unless commenced within 3 years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring the action is under any legal disability to sue, the action may be commenced at any time within 3 years after the disability is removed."

The question was raised in this case that the action had not been filed within the 3-year period. The bonding

company took the position that the only exception contained in the statute is where the ward "is under any legal disability to sue" and that this particular provision was not involved in the action. The court, on page 968, said:

> "Although there is no case interpreting Section 1487 of the Probate Code on this question, there are many cases holding that such implied exceptions must or should be read into other statutes. One of the closest analogies is to be found in the cases interpreting Section 583 of the Code of Civil Procedure."

The court held that the time had not run.

See also:

Pacific Greyhound Lines v. Superior Court, 28 Cal. 2d 61, 168 P. 2d 665;

City of Pasadena v. The City of Alhambra, 33 Cal. 2d 908, 207 P. 2d 17;

Judson v. The Superior Court, 21 Cal. 2d 11, 129 P. 2d 361;

Bollinger v. The National Fire Insurance Company, 25 Cal. 2d 399, 154 P. 2d 399;

Westphall v. Westphall, 61 Cal. App. 2d 544, 143 P. 2d 405;

Ojeda v. The Municipal Court, 73 Cal. App. 2d 226, 166 P. 2d 49;

Anderson v. The City of San Diego, 118 Cal. App. 2d 726, 258 P. 2d 842;

Wilson v. Barry, 119 Cal. App. 2d 621, 259 P. 2d 991.

If the Money Was in Custodia Legis, Then the Writ of December 5, 1946, Remained in Full Force and Effect.

The appellant argues under point on Page 10 of his brief that the writ of attachment served on December 5, 1946, ceased to be effective after 3 years and cites in support of his position, *Loveland v. The Mining Company,* 76 Cal. 562, 564-565; *Hamilton v. Bell,* 123 Cal. 93, 95, to the point that a writ of attachment is purely a creature of statute. We make no point to the contrary, but as hereinbefore pointed out there are implied exceptions to the running of time under statutes. The mandatory injunction that a dismissal must be entered at the end of 5 years if the case has not been brought for trial is purely statutory. This mandate is a creature of the statute, yet the courts have written in and implied exceptions. The statute of limitations is a creature of statute and to this the courts have written in implied limitations. The rights given to employees under the various city charters creating pensions are rights created by statute. To these rights the courts have set forth implied exceptions. The compelling of one to foreclose a mechanic's lien within 90 days after filing is a creature of statute. To this there is an implied exception. The protection afforded the bonding company or the bondsman pursuant to Section 1487 of the Probate Code is a protection created solely by statute. To this the courts have written in an implied exception, and in the *Estate of Troy,* 1 Cal. App. 2d 732, the court invoked an implied exception to Section 542(b) of the Code of Civil Procedure.

The Question of Whether the Writ of Attachment Served on the County Clerk on August 12, 1948, Was or Was Not Effective.

If the property was *in custodia legis,* then of course the writ served August 12, 1948, served no purpose and created no lien. If the property was not *in custodia legis,* then that writ, was a valid writ and created a valid lien and the 3 years would not have expired until August 12, 1951.

We have pointed out above that the Clerk was enjoined from paying the money out until the judgment in Foley v. Riverside Iron and Steel Corporation became final, that this under the authorities stopped the running of the 3-year period under Section 542(b). If this is not true, then of course the writ of August 12, 1948, was good. Under either one of these alternatives, the lien on the fund existed long prior to the 4 months here involved.

Appellant pursues this argument further with the statement that the lien of the attachment or garnishment merges into the lien of the execution and is good for a period of only one year from the time of the service by the Sheriff of writ of execution, from this appellant argues that the lien of the garnishment merged into the lien of the execution issued on the 28th day of June, 1949, that the lien ceased to exist on the 28th day of June, 1950, some 5 months prior to the issuance of the execution of the 21st day of November, 1950.

Section 688 of the Code of Civil Procedure of the State of California sets forth what property is liable to

execution and it does not describe a cause of action or the proceeds of a cause of action in the hands of the Clerk. No point is made, as we understand it, by the appellant that a lien can attach to a cause of action or to the proceeds of a cause of action. Section 688.1 provides how a judgment creditor of a plaintiff in an action or special proceeding may get a lien on the proceeds of the judgment, and it is conceded here that no attempt was made to pursue this section obviously for the reason that the section is specifically limited to plaintiffs and in Foley v. Riverside Iron and Steel Corporation, Riverside Iron and Steel Corporation was a defendant and not within the contemplation of Section 688.1. Therefore, the execution issued on the 28th day of June, 1949, not being permissible by statute created no lien into which either one of the garnishments could merge. It follows from this that the argument that the garnishment merged into the lien of the execution and that the lien of the execution was good for one year only is of no moment in this proceeding.

Appellant cites at length *Durkin v. Durkin,* 133 Cal. App. 2d 283, 293-295, to the point that the lien of the attachment merged into the lien of the execution and that the lien of the execution remained in effect only one year from the date of service. In *Durkin v. Durkin, supra,* both the lien of the attachment and the lien of the execution expired prior to the deposit of the money into *custodia legis,* and therefore the point involved here was not involved there. Here the lien had not expired at the time of the deposit of the money into court.

The Appellant Is Making a Collateral Attack on the Order of the Superior Court of the State of California, in and for the County of Los Angeles Dated December 8, 1950, in the Action Foley v. Riverside Iron and Steel Corporation.

The appellant's argument that appellee obtained the funds in issue only as a result of the writ of execution issued on November 21, 1950, is without merit. The appellee obtained the funds pursuant to garnishment, writ of execution and order of the Superior Court. The order to show cause appears at pages 55 and 56 of the transcript. The court found as a fact that Harold J. Ostly, County Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, held funds subject to a writ of garnishment and subject to a writ of execution. The County Clerk found that LeRoy B. Lorenz, the assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt, had been served with the order to show cause, had defaulted, and that his default had been entered. The court, in order to make the order, had to have jurisdiction over all of the parties who had an interest in the fund. The affidavits filed in the action were used as evidence at the hearing and the finding was that Riverside Iron and Steel Corporation and Harlan H. Bradt were no longer interested in the fund. It belonged to their assignee, LeRoy B. Lorenz. The appellant here has no right to make a collateral attack on this order holding that his bankrupt had parted with title.

In *Liberman v. The Superior Court,* 72 Cal. App. 18, the court on page 34 points out:

> "Petitioners insist, concerning the rule to the effect that the pronouncements of courts of superior

> or general jurisdiction are not subject to collateral attack unless the want of jurisdiction appears on the face of the record, that it has no application to orders, but relates only to judgments. This contention is without merit. 'The rule against the collateral impeachment of judgments applies generally to all varieties of judgments, decrees or orders made by courts of competent jurisdiction, in all kinds of judicial proceedings' (34 C. J. p. 514). 'The rule against collateral attack applies to orders and judgments made by the courts in special proceedings taken before them, although not in the nature of contested actions, or purely *ex parte,* provided the matter involves a judicial determination and carries the sanction of the court's authority (34 C. J. 517).' "

In the case at bar, we have two things: We have the assignment of the judgment by Riverside Iron and Steel Corporation and Harlan H. Bradt to LeRoy B. Lorenz. We have the order of the Superior Court dated December 8, 1950, in the case of Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt directing the Clerk to pay out of the fund deposited with him by Foley the moneys due Wood. Before the appellant may pursue his alleged cause of action, he must set aside the order and set aside the assignment.

Conclusion.

It is respectfully submitted that the writ of attachment served on December 5, 1946, remained effective until long after the judgment in Foley v. Riverside Iron and Steel Corporation, if the funds were held *in custodia legis.*

It is respectfully submitted that if the funds were not *in custodia legis,* that then the second writ of attach-

ment served upon the County Clerk was good and did not expire until long after the court made its order for payment by the County Clerk.

It is respectfully submitted that under the law of California, regardless of whether the funds were *in custodia legis* or not, they were not subject to execution prior to final judgment, and that therefore no lien was ever obtained into which the garnishments could merge.

It is respectfully submitted that before the appellant may pursue any remedy that he may have, he must first set aside the order of December 8, 1950, in the Superior Court and he must set aside the assignment of the proceeds of the judgment by Riverside Iron and Steel Corporation and Harlan H. Bradt to LeRoy B. Lorenz.

It is respectfully submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

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